UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

LITTLE FLOWER CHILDREN'S SERVICES
OF NEW YORK, INC.
Employer

and Case No. 29-RD-934

KRISTEN DROWN, AN INDIVIDUAL
Petitioner

and

COMMUNITY AND SOCIAL SERVICE AGENCY
EMPLOYEES, DISTRICT COUNCIL 1707, AMERICAN
FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO[1]
Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Amy J. Gladstone, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

[1] Community and Social Service Agency Employees, District Council 1707, American Federation of State, County and Municipal Employees, AFL-CIO, herein the Intervenor, intervened on the basis of its incumbency as the representative of the employees in the unit set forth in the petition.

2. The record reveals, and the parties stipulated, that Little Flower Children's Services of New York, Inc., herein called the Employer, a New York not-for-profit corporation, with its principal office and place of business located at 186 Remsen Street, Brooklyn, New York, and with several other facilities located in Queens and Brooklyn, New York, and Wading River, New York, is engaged in providing social and child welfare services including foster care, adoption and residential care. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of $250,000 and provided services to the City of New York valued in excess of $50,000.

Based on the record as a whole, and the stipulations of the parties, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Kristen Drown, herein the Petitioner, filed the instant petition seeking an election among the employees in the unit set forth below. The Intervenor contends that a Memorandum of Agreement, herein the MOA, executed by the parties on June 22, 1998, constitutes a bar to the instant petition. The Employer contends that the MOA does not set forth the complete terms of the parties agreement as subsequently negotiated and therefore is not entitled to bar quality. For the reasons set forth below, I find that the MOA does not constitute a bar to the processing of this petition and that the conduct of an election is warranted.

The record reveals that the Intervenor was certified as the Section 9(a) representative on July 9, 1997, in the unit described herein, following the conduct of an election. Thereafter, on June 22, 1998, the parties executed a MOA setting forth various terms and condition of employment. While certain terms are set forth in vague terms or refer to language as it may appear in other collective bargaining agreements, e.g.," 16. Management Rights – Traditional form of language and as per current;" 2. Union Security – "Agency Shop," with voluntary dues/fees check-off.," the MOA appears to address sufficient terms and conditions of employment that might otherwise qualify it as contract worthy of bar quality. What is problematic is the absence of effective or termination dates appearing anywhere in the document. Rather, paragraph 26 of the MOA, entitled Duration – Effective dates of Contract, provides that it will be effective 3 years from "ratification of the contract." There is no reference anywhere in the MOA as to a date of ratification which might allow an employee or another labor organization to determine when the open period would be for the filing of a petition to contest the Intervenor's representative status. The Board has long held that the termination date of a contract is a "substantial term" and that contracts having no fixed duration shall not be considered a bar for any period. Cind-R-Lite Co., a Division of T.E. Connolly, Inc., 239 NLRB 1255 (1979). The Board further stated that the expiration date of the agreement must be apparent from the face of the contract without resort to parol evidence, before that contract can serve as a bar. Id, at 1256. Earlier in Union Fish Company, 156 NLRB 187, at 191, 192 (1965), the Board explained the policy behind the requirement that a contract must, within the four corners of the document, state the fixed term or duration of a contract in order for the contract to have bar quality:

> Two objects of the Board's contract bar policies are to afford parties to collective bargaining agreements an opportunity to achieve, for a reasonable period, industrial stability free from petitions seeking to change the bargaining relationship, and to provide employees the opportunity to select bargaining representatives at reasonable and **predictable intervals.** To properly achieve these objects, in determining whether an existing contract constitutes a bar, the Board looks to the contract's fixed term or duration, because it is this term on the face of the contract to which employees and outside unions look to predict the appropriate time for the filing of a representation petition. The **desired predictability** would be lost if reliance were placed on factors other then the fixed term of the contract. Accordingly, **the Board requires that the term, as well as the adequacy of a contract, must be sufficient on its face, with no resort to parol evidence necessary, before the contract can serve as a bar. (Emphasis supplied.)**

In a more recent decision, Tinton Falls Conva Center, 301 NLRB 937 (1991), the Board re-affirmed its holding in Union Fish **,** wherein it reinstated a petition dismissed by a regional director on contract bar grounds. The Board noted that the second objective behind the contract bar policy discussed in Union Fish, "cannot easily be achieved if petitioning employees must go beyond the face of a collective bargaining agreement to determine whether it is in effect and for what period." Id, at 939.

Applying this principle to the case at bar, it is clear that the MOA does not have bar quality. The contract has neither an effective date nor a termination date. Rather, the implementation date and termination date in the MOA are totally dependent upon an external event, i.e., ratification, the date for which is, in no fashion, referred to in the document. This agreement provides no guidance to an employee or outside labor organization in determining when the representative status of the incumbent union could be challenged. Thus, the effectuation of employees' Section 7 right to select

"representatives of their own choosing," would be frustrated were we to accord bar quality to this MOA in light of this clear infirmity.[2]

In addition to the foregoing, it appears from the record that the union security provision referred to in the MOA fails to comply with the proviso to Section 8(a)(3) of the Act in that it does not afford employees the required 30 day grace period before union membership or the equivalent thereof becomes mandatory. The MOA provides at paragraph 2, titled "Union Security," a reference to "Agency Shop." There contains no further explanation as to employees' obligations or rights regarding this requirement. Review of the parties most recent proposed contract dated November 11, 1999, and received in evidence as Employer's 6, sheds light on this issue and reveals the illegality of the provision. Article II- Union Security provides, in pertinent part:

> All employees in the bargaining unit now or who are hired or transfer into the bargaining unit after the date of execution of this Agreement shall, as a condition of employment, chose either to be a member of the Union in good standing or to be an agency fee payer, upon completion of their probationary period.

It is clear from the above, that unit members who have already passed probation at the time of the execution of the agreement are accorded no grace period in which to join the Union or become a fee payer, let alone the mandatory thirty days. Further, employees who have completed more than five months of their six month probation, are likewise denied the full thirty day period as their obligation to become a member arises at the completion of their probationary period. Thus, the clause, as it appears in the

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[2] The Board's decision in Cooper Tire and Rubber Company, 181 NLRB 509 (1970) does not compel a contrary conclusion. There, the Board reversed a regional director and found that a contract possessed bar quality despite that the effective and termination dates were not explicitly set forth in the contract. The contract in question did state that the contract would "become effective ……., 1968. . .until……, 1971. When read in conjunction with the wage section which provided that the three annual wage increases would be effective on September 1, 1968, 1969, 1970, the Board concluded that the contract could reasonably be construed "on its face" as being effective for a three year term from September 1, 1968 to August 31, 1971. Those facts are not present here. If anything, the wage increases magnify the uncertainty as to the MOA's start and finish as said increases are also keyed to the ratification.

MOA, does not provide for the statutory thirty day grace period and, as amplified by the most recent contract proposal, reveals a clear failure to meet the statutory requirement that unit members be given a thirty day grace period before being saddled with a financial obligation to the Union. For this additional reason, I find that the MOA does not have bar quality. [3]

As noted earlier, the Intervenor was certified by the Board on July 9, 1997, in Case No. 29-RC-8833, as the exclusive collective bargaining representative within the meaning of Section 9(a) of the Act, of the employees in the unit set forth below. The parties stipulated, and I find, that said unit is appropriate for the purposes of collective bargaining:

> All full-time and regular part-time child care workers, direct care workers, crisis intervention counselors, social workers, transportation employees, maintenance and housekeeping employees, secretaries, clericals, computer services, and nursing care employees employed by the Employer at its facilities at 186 Remsen Street, Brooklyn, New York, 89-12 162nd Street, Queens, New York, 186 Joralemon Street, Brooklyn, New York, 14 East 21st Street, Brooklyn, New York, and North Wading Rive Road, Wading River, New York, excluding all professional employees including registered nurses, guard employees and supervisors as defined in Section 2(11) of the Act.

[3] See Paragon Products Corp., 134 NLRB 662 (1962), and its progeny.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by Community and Social Service Agency Employees, District Council 1707, American Federation of State, County and Municipal Employees, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full

names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before November 26, 1999. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by December 3, 1999.

Dated at Brooklyn, New York, this 19th day of November, 1999.

/S/ ALVIN P. BLYER

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